Supreme Court of the United States

OCTOBER TERM 1948

No. 187

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WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE
and EARL W. HITCH

Petitioners

v.

METROPOLITAN LIFE INSURANCE COMPANY

Respondent

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW YORK COUNTY
STATE OF NEW YORK

REPLY TO MEMORANDUM IN OPPOSITION

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MAY IT PLEASE THE COURT:

It is hoped that this belated reply to the respondent's memorandum in opposition will be considered by the Court before the petition is determined. The memorandum in opposition confuses rather than clarifies the issues presented upon the petition.

The memorandum states that neither the Court of Appeals nor the lower courts of New York treated the regulation as though it were a municipal ordinance. (4)[1] This statement seems to be at variance with what the respondent tells the Court under subdivision 3 under the heading The Opinions Below. (3) The reason the Court of Appeals reserved for decision the question of whether the Fourteenth Amendment reached the petitioners was because the court had found the case to be controlled by *People* v. *Bohnke,* 287 N. Y. 154, which held valid a municipal ordinance similar to the device employed by the respondent in this case. See record pages 1028-1029.

The express reservation of this question by the Court of Appeals implicitly rejects the contention of the respondent that the Court of Appeals tacitly approved the holding of the trial court that a private regulation was not subject to the prohibitions of the Fourteenth Amendment. (4-5) It would be inconsistent for the Court of Appeals to tacitly approve a proposition of law which it expressly declined to pass upon. The opinion of the Court of Appeals, when given a reasonable construction, cannot be taken as approving the holding of the trial court that the Fourteenth Amendment does not reach petitioners.

If this Court concludes that the question of whether the invalidity of the regulation is reached by the Fourteenth Amendment was not passed upon by the court below and may not be considered here for that reason—rather than dismiss or deny the petition for writ of certiorari as suggested by the respondent (20-28, 29)—the Court should vacate the judgment and remand the case to the Court of Appeals as was done in *Musser* v. *Utah,* 68 S. Ct. 397 (decided February 9, 1948), where the Court said: "We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to

[1] Figures appearing in parentheses refer to pages of respondent's memorandum in opposition to petition for writ of certiorari.

deal with this ultimate issue of federal law and with any state law questions relevant to it." (68 S. Ct. at p. 398)

The petitioners, however, are willing to have this Court pass upon the question of whether the Fourteenth Amendment shields them against the impact of the regulation without remanding the case to the Court of Appeals. This Court is as competent to deal with this question now as it will be after the Court of Appeals has passed upon this question. There are no state questions that remain to be determined in the case which may result in a different determination in the court below, as existed in the case of *Musser* v. *Utah,* 68 S. Ct. 397. It is therefore suggested that, rather than dismiss the petition or even remand the case to the Court of Appeals, the Court should grant the petition for writ of certiorari and instruct counsel to brief this question and argue it before the Court.

The respondent attempts to lead the Court to believe that it did not resort sufficiently to self-help and take the law into its own hands to the extent that it justified the petitioners to invoke the Fourteenth Amendment. The petitioners have attempted to demonstrate that respondent has taken the law into its own hands so as to make it answerable, as though it were a state agency. See petition pp. 41-42. The respondent has denied that it used self-help. (22, 24)

In its memorandum in opposition, however, it does admit excluding Jehovah's witnesses from Parkchester. (24) Upon the trial the respondent stipulated that, if Jehovah's witnesses attempted to carry on their work, its policy would be enforced by "stopping said plaintiffs and preventing them from carrying on the aforesaid activities at Parkchester." See record page 61. The testimony offered by the petitioners, which was undisputed and unimpeached, showed that the guards ushered Jehovah's witnesses out of the apartment buildings and would not permit them to re-enter and upon every occasion that Jehovah's witnesses were discovered going toward the apartment buildings they

were denied the right to enter. See record pages 442-446, 452-456, 475-478, 497-499.

In view of the stipulation made upon the trial and the undisputed evidence it seems that the respondent should be estopped to deny that it did not take the law into its own hands so as to justify the petitioners in fleeing under the protecting wings of the Fourteenth Amendment, which mirrors the provisions of the First Amendment.

In any event, assuming that the Court does not find that the respondent has sufficiently donned the cloak of state authority by taking the law into its own hands by excluding Jehovah's witnesses from Parkchester buildings, the petitioners are, nevertheless, entitled to make use of the protecting shield of the Constitution. The reason for this is that the respondent has asked for affirmative relief. See the record at page 53. The court granted such affirmative relief in the form of a declaratory judgment. The judgment presented for review by this Court has the same legal effect as if it were rendered in a declaratory judgment action brought by the respondent against the petitioners. The judgment not only declares the regulation to be valid, as construed and applied to petitioners, under the Constitution, but it also legally approves the taking of the law into its own hands by respondent. The trial court said that the respondent had "the legal right to remove [petitioners] from said apartment buildings by the use of such force as may be lawful for that purpose." Record page 57. The fact that no injunctive relief was granted to the respondent is immaterial. The declaratory judgment carries with it the right to supplemental relief in the form of civil sanctions known as injunction. The coercive relief is at the disposal of the respondent at any time in the future that respondent desires to invoke it. The judgment is final. The finality of a declaratory judgment in favor of the respondent is, in legal effect, an injunction. No one would doubt that the Constitution could be invoked if the respondent had brought

an injunction action against the petitioners and procured a judgment for injunction. The injunction has been granted by the declaratory judgment but remains dormant until such time as it is invoked by the respondent through application for supplemental relief. See the petition pages 38-41.

The respondent says that the provisions of the First Amendment cannot be invoked by the petitioners through the Fourteenth Amendment because of the holding of the Court in the *Civil Rights Cases*, 109 U. S. 3 (1883). If the Court accepts this argument then the petitioners call upon the Court to reconsider and set aside its ruling in those cases because the holding in the *Civil Rights Cases* is erroneous and does not properly announce the law.

Upon the merits the respondent, as in the courts below, leans heavily upon the so-called poll. The illegality of this *ex parte* deposition (sired and nourished by the respondent while negotiations toward settlement were going on between counsel at about the time the action was begun) was demonstrated in the petition. See pages 14-16, 42-43. The *ex parte* deposition was objected to by the petitioners on the grounds that it was a violation of the due process clause and constituted an undue abridgment of their rights guaranteed by the First Amendment. The grounds are explicitly stated at pages 300-318 of the record, and are incorporated and made a part hereof.

To begin with, the so-called poll unfairly presented the issue to the tenants. The poll inquired whether each tenant wanted Jehovah's witnesses to visit him in his apartment, rather than whether the tenant had objections to Jehovah's witnesses' going from door to door. The poll was wholly irrelevant, immaterial and hearsay, and was an illegal effort to establish that the tenants had directed Jehovah's witnesses not to call. This proof was offered to establish trespass against the tenants on the part of Jehovah's witnesses. The action did not involve trespass by Jehovah's witnesses against the tenants. That issue was not in the case. The

issue was whether Jehovah's witnesses committed trespass against the respondent-landlord and whether the regulation was a valid measure to deal with that trespass. No trespass against any one of the tenants was proved. The finding of trespass by the trial court was based upon the alleged invasion of the landlord's rights. The poll is a mere sugar-coating or white-washing of the illegal conduct of the respondent. The respondent attempts to get retroactive approval by the tenants of its illegal conduct. More will be said about this so-called poll, if, as and when the brief in behalf of petitioners is filed. Furthermore, upon the trial, the poll was received in evidence and considered by the trial court for the limited purpose of establishing the reasonableness of respondent's regulation and not for the purpose of proving trespass against the tenants. Record 308, 310, 312, and 314.

WHEREFORE petitioners pray as in their petition for writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners